87-1232 No. ____



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

MARY ROSE,

*Petitioner,*

—against—

LONG ISLAND RAILROAD PENSION PLAN, LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSION APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustee of the Plan, T. P. MOORE and JOHN DOE, as members of the Plan's Board of Managers, T. M. TARANTO, J. B. HUFF and H. J. LIBERT, as members of the Plan's Board of Managers and the Joint Board on Pension Applications, E. YULE, W. STYZIAK and J. BOVE as members of the Joint Board on Pension Applications, and the LONG ISLAND RAILROAD,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID S. PREMINGER
ROSEN, SZEGDA, GERSOWITZ,
PREMINGER & BLOOM
67 Wall Street
New York, N.Y. 10005
(212) 862-5858

EDGAR PAUK
LEGAL SERVICES FOR
THE ELDERLY
132 West 43rd St.
3rd Floor
New York, N.Y. 10036
(212) 391-0120

*Attorneys for Petitioner*

96 pp

## QUESTION PRESENTED

Where the widow and seven orphans of a railroad worker were denied survivor's benefits from a railroad's pension plan solely because the worker, who was a vested participant with over 26 years of service, died in service without having chosen a survivor's option; and

Where ERISA provides that under such circumstances survivor's benefits must be paid, but exempts from that provision a "governmental plan";

(1) Was it error for the Second Circuit to hold that the railroad's plan was "governmental", where the railroad was a private stock corporation, its employees were not public employees, and the plan was not a public plan under state law?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. __________

---

MARY ROSE,

Petitioner,

- against -

LONG ISLAND RAILROAD PENSION PLAN, LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSION APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustee of the Plan, T. P. MOORE and JOHN DOE, as members of the Plan's Board of Managers, T. M. TARANTO, J. B. HUFF and H. J. LIBERT, as members of the Plan's Board of Managers and the Joint Board on Pension Applications, E. YULE, W. STYZIAK and J. BOVE as members of the Joint Board on Pension Applications, and the LONG ISLAND RAILROAD,

Respondents.

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Mary Rose prays that a writ of certiorari issue to review the order of

the United States Court of Appeals for the Second Circuit entered in this case on September 3, 1987.

## Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 828 F.2d 910 and is set forth at Appendix A herein. The bench ruling of the District Court for the Eastern District of New York, dated September 26, 1986, is not reported and is set forth at Appendix B herein.

An earlier opinion of the Second Circuit in this case (later vacated) reaching a contrary conclusion is set forth at Appendix C.

## Jurisdiction

The order of the Court of Appeals for the Second Circuit was dated and entered on September 3, 1987. Petitioner filed a timely motion for rehearing and rehearing *in banc*, which was denied on October 20, 1987 in an

order set forth at Appendix D herein. This petition for a writ of certiorari was filed within ninety days of the denial of the motion for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## Constitutional and Statutory Provisions

There are no federal constitutional provisions involved in this petition. The federal statutory provision involved is the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq. ("ERISA"), more particularly 29 U.S.C. § 1002(32) and 29 U.S.C. § 1055. The relevant texts of those and other relevant statutory provisions are set forth at Appendix E herein.

## Statement of the Case

Petitioner Mary Rose is the widow of Richard A. Rose and the mother of his seven

children. Mr. Rose died of leukemia on January 8, 1976, after attaining age 50 - the "normal retirement age" under the Long Island Railroad Pension Plan (the "Plan") - and working 26-1/2 years as a clerk for defendant Long Island Railroad Company ("LIRR"). At the time of his death Mr. Rose's right to a pension from the LIRR was fully vested; accordingly, at that time he was eligible to retire with a "service age" pension pursuant to the terms of the Plan.

The Plan provided for the option of converting service-age benefits into a pension of equivalent actuarial value payable to the retiree over his lifetime and to his surviving spouse for her lifetime (the "survivor's option"), provided such option was exercised in writing at least six months before retirement or death.

On February 24, 1976 plaintiff made

formal application to the LIRR Pension Plan for a survivor's pension as widow and beneficiary of Mr. Rose. On November 23, 1976, however, the majority of the Joint Board on Pension Applications - then composed of five members, three appointed by management, two by the unions - voted to deny plaintiff a survivor's pension on the sole ground that Mr. Rose had not exercised the survivor's option before his death. As a result, despite Mr. Rose's long years of service, neither he, while alive, nor his widow and seven children received any pension benefits whatsoever.

Although it is conceded that Mr. Rose did not exercise the survivor's option before his death, it is undisputed that he never waived that option. Sections 205(a) and (e) of ERISA, 29 U.S.C. §§ 1055(a) and (e) (A-57), mandate the payment of a joint and survivor's

annuity to the spouse of a participant who dies after normal retirement age, <u>unless</u> those benefits were knowingly waived in writing by the participant. Because Mr. Rose never waived survivor's benefits, if ERISA applies to the LIRR Pension Plan, plaintiff is entitled to those benefits.

Defendants' sole defense is that ERISA does not apply to the LIRR Plan because it is a "governmental plan", exempt from ERISA coverage pursuant to the provisions of Section 4(b)(1) of ERISA, 29 U.S.C. § 1003(b)(1) (A-56). Defendants mainly base their argument on an <u>expansive</u> definition of ERISA's "governmental plan" <u>exemption</u> and a proportionally <u>narrow</u> definition of its <u>coverage</u>; and on the fact that the State of New York has been periodically subsidizing the Metropolitan Transportation Authority ("MTA"), defendant LIRR's holding corpora-

tion, and thus also the LIRR.

Under New York Public Authorities Law ("PAL"), however, the following is established:

1. LIRR employees at the relevant time were not public employees (PAL § 1265(9)(a)), or employees of the MTA (A-61);

2. The MTA and its subsidiary corporations (including the LIRR) must be run on a "self-sustaining" basis (PAL § 1266(3)) (A-64);

3. In 1966, when the MTA purchased the stock - but not the assets - of the LIRR from the Pennsylvania Railroad, all subsidiaries of the MTA were to be public benefit corporations. In order to retain the LIRR's status as a <u>private stock corporation</u>, the law was amended effetive May 23, 1966, retroactive to the purchase date of the LIRR, namely January 20, 1966, to permit the MTA to

own a private stock corporation as its subsidiary. (PAL § 1266(5)) (A-67).

4. Unlike a private stock corporation, a public benefit corporation cannot contract indebtedness (PAL § 1266(5)) (A-67);

5. Althought the MTA may issue bonds to finance its own and the LIRR's operations, the State is not liable in case of default (PAL § 1269(8))(A-69);

6. As non-public employees, the LIRR's employees were not eligible to join the New York State Employees Retirement Systems (PAL § 1265(9)(b) (A-62);

7. Because under New York law, the LIRR Pension Plan is not a public pension plan, its benefits are not protected against termination or reduction by the non-impairment clause of Article V, Section 7 of the New York Constitution (A-61);

8. The New York State Comptroller, who is charged with supervisory functions vis-a-vis all New York public pension plans, not only has declared himself to have no authority over the LIRR Plan, but has taken the position that supervision of the Plan is the responsibility of the U.S. Department of Labor, presumably pursuant to ERISA (A-71, 72).

## REASONS FOR GRANTING THE WRIT

ERISA, one of the most far-reaching remedial statutes ever enacted by Congress, set minimum standards for private pension plans. Congress found that such plans affect "the continued well-being and security of millions of employees and their dependents", and are "affected with a national public interest." 29 U.S.C. § 1001(a) (A-51).

This case presents to this Court for the first time the question of the proper

interpretation of the "governmental plan" exemption from ERISA coverage. That exemption, as its name indicates, applies to the pension plans of federal, state and local governments, their agencies and instrumentalities.

The Second Circuit, in holding that the LIRR Pension Plan was an exempt "governmental plan", interpreted ERISA's "governmental plan" exemption very broadly; resolved all the acknowledged ambiguities in the definition against coverage, and deprived of all meaning certain words contained in the definition. Thus, it violated the most furdamental canons of statutory construction, disregarded Congress' remedial intent, and engaged in improper judicial legislation. If left undisturbed, the Second Circuit's decision will effect not only the rights of Mrs. Rose and her seven children, but those

of 8,000 LIRR employees and their beneficiaries. In addition, countless other workers throughout the country will be left unprotected because a far-reaching precedent will have been set for the broad interpretation of ERISA's exemptions.

Finally, the federal government will be deprived of federal jurisdiction over the pension plan of the very same railroad which this Court has recently held subject to federal regulation under the Railway Labor Act. United Transportation Union v. Long Island Rail Road Company, 455 U.S. 678 (1982) ("UTU").

A. The Court below violated the well-established rule of statutory interpretation that Congress is not to be presumed to have used words for no purpose, with its corollary that a court must, if possible, give effect to every phrase of a statute, so that no part is rendered superfluous.

1. The Court below read out of the "governmental plan" exemption the word "government"

The "governmental plan" exemption from Title I coverage is contained at 29 U.S.C. § 1003(b)(1)(A-56). "Governmental plan" is defined at 29 U.S.C. § 1002(32) (A-55) in pertinent part as follows:

> The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Because the word "government" modifies both "State" and "political subdivision," in order to be exempt a plan must be that of

a political subdivision which is a <u>government</u>, or of an "agency or instrumentality" <u>of</u> a political subdivision which is a <u>government</u>. In other words, the term "governmental plan", as its title indicates, refers to plans of <u>governments</u> or of agencies or instrumentalities of <u>governments</u>. The reason for that is that Congress believed, as acknowledged by the Court below, that "'the ability of the governmental entities to fulfill their obligations to employees through their taxing powers' was an adequate substitute for both minimum funding standards and plan termination insurance." (A-9) Only <u>governments</u> have the taxing power. Because neither the LIRR nor the MTA (its holding corporation) has the taxing power, the LIRR's plan cannot be "governmental".

The Court below, however, chose a reading of the "governmental plan" exemption that

entirely eliminates the word "government" from the definition. The Panel concluded, in fact, that the plans of _all_ political subdivisions are exempt, whether or not they are _governments_. It stated:

> If, as Rose maintains, Congress enacted the exemption primarily to protect the autonomy of state and local _governments_, then it would not make sense to extend the exemption to state agencies and instrumentalities -- which are not governments -- while denying the exemption to public authorites.

(A-11)

Petitioner never maintained, however, that the plans of "state agencies or instrumentalities" cannot be exempt as "governmental." Those plans, however, are "governmental" _not because_ those entities are the _governments_ of political subdivisions, _but because_ they are "agencies or instrumentalities" of such _governments_. It is _governments_ that are responsible for the maintenance of their

"agencies or instrumentalities" through their taxing powers. No <u>government</u> has any obligation or responsibility for funding the LIRR Pension Plan.

The Court below pointed to the fact that, unlike the definitions contained in ERISA's Title I, at 29 U.S.C. § 1002(32) (A-55), "governmental" plans in Title III - in which Congress provided for the study of such plans with a view to future legislation - are referred to as established and maintained "by any State... or political subdivision thereof," without any reference to the word <u>government</u>. The Panel thus concluded that "[t]his phrasing does not suffer from the ambiguity of the § 1002(32) definition," because it "clearly encompasses <u>all</u> political subdivisions of states, whether or not they are <u>governments</u>." (A-12) Section 1231, however, goes on to state:

> In determining whether any such [governmental] plan is adequately financed, each committee shall consider the necessity for minimum funding standards, as well as <u>the taxing power of the government maintaining the plan</u>.

(A-59) (Emphasis added) It is clear, in sum, that Congress meant to exclude as "governmental" only plans financed by <u>governments</u>. By ignoring the word "government" the Court below frustrated the will of Congress.

2. <u>The Court below read out of the "established/maintained" definition of "governmental plan" the word "established"</u>

Title I of ERISA (29 U.S.C. § 1002(32)) provides that a "governmental plan" is one "established <u>or</u> maintained" by a governmental entity. (A-55) Titles II (26 U.S.C. § 414(d))(A-60), III (29 U.S.C. § 1231) (A-58) and IV (29 U.S.C. § 1321(b)(2))(A-59), on the other hand, define such exempt plans as "established <u>and</u> maintained." Because the

LIRR Plan was established in 1938 by the Pennsylvania Railroad, a private corporation, the difference between the two definitions could be dispositive of the litigation.

The Court below agreed with petitioner that the "discrepancy" (A-22) in the definition of "governmental plan" finds no explanation in the legislative history of ERISA (A-22). It noted that "[t]he fact that both versions of the governmental plan definition lead to seemingly incongruous results makes the discrepancy all the more troubling." (A-23) Instead of choosing one of the two inconsistent definitions of "governmental plan", however, the Panel read out of ERISA the word "established" altogether and gave it no force or effect. It stated:

> the status of the entity which currently maintains a particular pension plan bears more relation to Congress' goals in enacting ERISA and its various exemptions,

than the status of the entity which established the Plan.

(A-24) Yet, it is a long- and well-established rule of statutory construction that "Congress is not to be presumed to have used words for no purpose." Amato v. Western Union Intern., 773 F.2d 1402 (2d Cir. 1985), at 1408, cert. den., ____ U.S. ____, 106 S.Ct. 1167, 89 L.Ed. 2d 288 (1986) ("Amato"), quoting from Platt v. Union Pacific R.R. Co., 99 U.S. (9 Otto) 48, 58, 25 L.Ed. 424 (1878). Similarly well-established is the rule that "a court must, if possible, give effect to every phrase of a statute so that no part is rendered superfluous." Amato, supra, id., quoting from National Insulation Transp. Com. v. ICC, 683 F.2d 533, 537 (D.C. Cir. 1982). See also: Fulps v. City of Springfield, Tenn., 715 F.2d 1088, 1093 (6th Cir. 1983), and Zimmerman v. North American Signal Co.,

704 F.2d 347, 353 (7th Cir. 1983). The Court below, however, violated both rules of statutory construction.

B. <u>The Court below also violated the equally well-established rule that, in construing a remedial statute, its coverage should be interpreted broadly, its exemptions, narrowly.</u>

1. <u>The Court below mistakenly chose a broad reading of the "governmental plan" exemption</u>

As the court below recognized, ERISA contains two inconsistent definitions of "governmental plan," namely, "established and maintained," and "established or maintained." The difference between them is that the former definition is <u>narrower</u> than the latter, because it requires an entity to be <u>both</u> "established" <u>and</u> "maintained" by a governmental entity to be exempt from ERISA coverage. Because at issue is the definition of an <u>exemption</u> from a <u>remedial</u> statute, and

because the court below agrees that the same definition of "governmental plan" should govern throughout ERISA, it is the _narrow_ definition that should prevail. _Piedmont & Northern Ry. Co. v. Interstate Commerce Com'n._, 286 U.S. 299, 311-312, 52 S.Ct. 541, 76 L.Ed. 1115 (1932). Indeed, Congress itself intended that exemptions from ERISA's coverage be construed narrowly. _Connolly v. Pension Benefit Guar. Corp._, 581 F.2d 729, 732 (9th Cir. 1978), _cert. den._, 440 U.S. 935, 99 S.Ct 1278, 59 L.Ed.2d 492 (1979). The Court below, however, adopted the _broad_ definition of "governmental plan", thus violating a fundamental rule of statutory construction.

2. <u>The Court below also construed broadly the term "established" in the exemption</u>

The Court below stated that, "even if we agreed with Rose that the correct interpretation of § 1002(32) was <u>established and maintained</u>, we would still not conclude that the LIRR Plan was covered by ERISA, because the Plan was in fact established <u>and</u> maintained by the LIRR." (A-24)

The Court below agreed that the Plan was set up by the Pennsylvania Railroad in 1938; it also agreed that the LIRR did not "terminate" the predecessor Plan, because "termination of a plan triggers the immediate vesting of all accrued benefits and distribution of plan assets [citations omitted]". (A-25) It also agreed that, "[a]ccording to the IRS regulations, replacement of a plan with a comparable plan does not constitute a 'termination'." <u>Id</u>. Nevertheless, the Court

below, in a truly remarkable _non sequitur_, held that the "details" of a plan's "establishment" were not a concern of Congress, and, that, therefore the LIRR's 1971 amendment in its entirety of the 1938 pension plan "established" the plan in 1971. (A-25) The Panel reached its conclusion by a "broad reading" of the term "established," as "more consistent with the legislative intent behind the governmental plan exemption." (A-26) Once again the court below refused to give a _narrow_ interpretation to an _exemption_ from a _remedial_ statute, contrary to the well-established canon of statutory construction. Furthermore, while it purported to rely on _Feinstein v. Lewis_, 477 F.Supp. 1256 (S.D.N.Y. 1979), _aff'd_, 622 F.2d 573 (2d Cir. 1980), the court below ignored the first part of _Feinstein's_ holding, namely that "_Congress_, in its exempting governmental

plans, was concerned more with the governmental nature of public employees and public employers than with the details of how a plan was established or maintained." (Emphasis added) At the relevant time in 1976, of course, the LIRR employees were not public employees. UTU, supra, 455 U.S. at 681; PAL § 1265(9)(a) (A-62)

C. The Court below improperly applied to the interpretation of ERISA criteria applicable to the interpretation of the NLRB and Title VII

Thirteen years after the enactment of ERISA, neither the U.S. Department of Labor nor the P.B.G.C., nor the I.R.S. has issued any regulations clarifying the "governmental plan" exemption or providing definitions under ERISA of terms like "political subdivision" and "agency or instrumentality." Also, there have been no court decisions providing guidance with regard to the issues

in this litigation. As a result, the Court below has mistakenly engrafted court decisions concerning the NLRB and Title VII onto ERISA. As has been held recently, however, with regard to the similarity between the statutory definitions of "employer" found in the Fair Labor Standards Act of 1938, 29 U.S.C. § 203(d), and in ERISA, 29 U.S.C. § 1002(2),

> The method of analogy is, of course, a legitimate method of reaching a decision. But in matters of statutory construction of ERISA our responsibility is to ascertain the intention of Congress in ERISA and not its intention in enacting a separate federal statute.

Solomon v. Klein, 770 F.2d 352, 354-355 (3rd Cir. 1985).

In an attempt to justify this unnatural engrafting, the Panel resorted to selective citation stating:

> The NLRB guidelines are a useful aid in interpreting ERISA's governmental exemption, because

> ERISA, like the National Labor Relations Act, "represents an effort to strike an appropriate balance between the interests of employers and labor organizations." H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4647.

(A-14). The <u>correct</u> citation from the legislative history of ERISA, however, is quite different:

> The Bill reported by the Committee represents an effort to strike an appropriate balance between the interests of employers and labor organizations..., <u>and the need of the workers for a level of protection which will adequately protect their rights and just expectations</u>.

H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4647. (Emphasis added) It is clear from the legislative history cited above that the balance sought by ERISA was <u>not</u> between the interests of employers and labor organizations, as mistakenly stated by the Court below, but <u>between those of employers and labor organizations on one side</u>, and those of

the workers on the other. The NLRB guidelines, therefore are not "a useful aid in interpreting ERISA's governmental exemption," as claimed by the Court below. ERISA must be interpreted within the context of its own legislative history.

D. The Court below engaged in improper "judicial legislation".

The Court below held that the LIRR was an "agency or instrumentality" of the MTA, which in turn was held to be a "political subdivision" of the State of New York. In so holding, the Court entirely overlooked the fact that a corporation like the LIRR cannot, without more, be labelled an "instrumentality." A private corporation is held to be an "instrumentality" despite its presumptive separate legal identity only when it is shown that it is a mere shell, truly an "instrument of its shareholders or parent

corporation." The fact, however, that all of the LIRR's outstanding stock was owned by the MTA did not render it a "mere instrumentality" of either the MTA or the State, absent a showing that its separate legal identity had been destroyed. In re Beck Industries, Inc., 479 F.2d 410 (2nd Cir. 1973), at 417, cert., den., 414 U.S. 858, 94 S.Ct. 163, 38 L.Ed.2d 108 (1973). No such showing can be made by defendants and it would be to no avail if made, for the law is well settled that a corporation cannot challenge its own separate corporate identity when it suits its purposes. Schenly Distillers Corporation v. United States, 326 U.S. 432, at 437, 66 S.Ct. 247, at 249 (1946).

In a recent decision, the First Circuit reiterated in an ERISA context that "the principle of limited liability is a

cornerstone of corporate law," which is only limited "by the common law doctrine which permits the piercing of the corporate veil and by statutory exception..." De Breceni v. Graf Bros. Lessing, 828 F.2d 877, 879 (1st Cir. 1987). See also: Connors v. P & M Coal, 801 F.2d 1373 (D.C.C. 1986), and authorities cited therein.

One of the consequences of the Court's labelling the LIRR an "agency or instrumentality" of the MTA, and the MTA a "political subdivision" of the State of New York, is to open the State of New York to liability for the large unfunded liability of the LIRR Plan, the LIRR and the MTA. That result runs counter to the very purpose of maintaining the LIRR as a separate, private corporation in order to insulate both the State and the MTA from any liability incurred by the LIRR. The Court below clearly failed to take into

account the serious ramifications of its judicial legislation.

It is also important to note that the Court below, the first time this matter was submitted to it, held unanimously that the LIRR's Plan <u>was not</u> a "governmental plan." (A-34-48) All the reasoning the court found persuasive the first time around, it found unpersuasive the second time around, when it held that Plan <u>was</u> a "governmental plan" and, therefore, exempt from ERISA coverage. The only difference between the two appeals was that, in the earlier appeal, the LIRR did not argue that ERISA coverage would cost it money, because of the necessity to fund its unfunded Plan, while it did so in the second appeal. The court's second decision was entirely result-oriented, in that it sought to protect the <u>LIRR</u> from the need to <u>fund</u> its plan. ERISA, however, was enacted to protect <u>employees</u>, not <u>employers</u>. The Court's second

decision is a blatant example of judicial legislation that should be reviewed by this Court.

E. The payment of subsidies to the LIRR by the State through the MTA is irrelevant, as neither is an <u>"employer" of LIRR employees</u>

In providing that a "governmental plan" is one "established" and/or "maintained" by a governmental entity for <u>its employees</u>, ERISA focuses also on the governmental status of the "employer". "Employer" is defined by ERISA at 29 U.S.C. § 1002(5) as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan..." (A-55) The fact that the State through the MTA has been subsidizing the LIRR, however, does not cause either the State or the MTA to be considered an "employer" of LIRR employees. This is so because, as noted, LIRR employees are not

employees of either the State or the MTA. Moreover, the courts have held that not even a "person" acting as a surety with regard to pension obligations is an "employer" under ERISA. Carpenters South. Cal. v. Camp, 738 F.2d 999 (9th Cir. 1984); Carpenters South. Cal. v. Majestic Housing, 743 F.2d 1341 (9th Cir. 1984). The State of New York and the MTA are most certainly not sureties for the LIRR's obligations (including its pension plan obligations), and neither one has any legal obligation whatsoever to subsidize the LIRR. Indeed, New York law provides that the MTA must run its operations and those of its subsidiaries "on a self-sustaining basis." PAL § 1266(3) (A-64) It follows that the LIRR Plan cannot be exempt from ERISA coverage, because neither the State nor the MTA is an "employer" of LIRR "employees."

Moreover, neither the State nor the

MTA, the owner of the LIRR's stock, can be considered an "employer" under ERISA, unless they "engaged in conduct justifying 'veil-piercing'". Only "[w]hen conduct justifying 'veil-piercing' is present, the corporate form is disregarded... The law of 'veil-piercing' determines the legal identity of the ERISA employer." Connors v. Marontha Coal Co., 670 F.Supp. 45 (D.C., D.C. 1987); Connors v. P & M Coal Co., supra. There is no allegation of conduct justifying "veil-piercing" here. Furthermore, as discussed earlier, a corporate entity cannot "pierce" its own "veil".

## CONCLUSION

For the above reasons, a writ of *certiorari* should issue to review the order of the United States Court of Appeals for the Second Circuit in this case.

Dated: December 31, 1987

Respectfully submitted,

EDGAR PAUK
LEGAL SERVICES FOR
THE ELDERLY
132 West 43rd Street,
3rd Floor
New York, N.Y. 10036
(212) 391-0120

DAVID S. PREMINGER
ROSEN, SZEGDA,
GERSOWITZ, PREMINGER
& BLOOM
67 Wall Street
New York, N.Y. 10005
(212) 862-5858

Attorneys for Petitioner

# APPENDICES

APPENDIX A Opinion of the Court of Appeals for the Second Circuit.

# UNITED STATES COURT OF APPEALS

## FOR THE SECOND CIRCUIT

No. 959—August Term, 1986

(Argued: March 30, 1987 Decided: September 3, 1987)

Docket No. 86-7942

MARY ROSE,

*Plaintiff-Appellant,*

—v.—

THE LONG ISLAND RAILROAD PENSION PLAN, LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSION APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustee of the Plan, T.P. MOORE and JOHN DOE, as members of the Plan Board of Managers, T.M. TARANTO, J.B. HUFF and H.J. LIBERT, as members of the Plan Board of Managers and the Joint Board on Pension Applications, E. YULE, W. STYZIAK and J. BOVE, as members of the Joint Board on Pension Applications, and THE LONG ISLAND RAILROAD,

*Defendants-Appellees.*

Before:

MESKILL, PIERCE* and ALTIMARI,
*Circuit Judges.*

Appeal from an order of the United States District Court for the Eastern District of New York (Bramwell, J.) granting defendants' motion for summary judgment on the ground that the Long Island Railroad's pension plan was a governmental plan and therefore exempt from compliance with the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*

Affirmed.

EDGAR PAUK, Legal Services for the Elderly, New York, N.Y. (David S. Preminger, New York, N.Y., Rosen, Szegda, Gersowitz, Preminger & Bloom, of Counsel), *for Plaintiff-Appellant.*

EUGENE P. SOUTHER, New York, N.Y. (Seward & Kissel, Bruce D. Senzel, Mark J. Hyland and Dan J. Schulman, New York, N.Y.; the Long Island Railroad

* Judge Pierce was designated subsequent to oral argument, pursuant to Second Circuit Rule 0.14, to replace Chief Judge Feinberg, who recused himself.

Company, Thomas M. Taranto and Roger J. Schiera, of Counsel), *for Defendants-Appellees.*

ROGER M. OLSEN, Assistant Attorney General, Washington, D.C. (Michael L. Paup, David English Carmack and B. Paul Klein, Attorneys, Dept. of Justice, Washington, D.C.; William F. Nelson, Chief Counsel, Internal Revenue Service, Washington, D.C.; George S. Salem, Solicitor of Labor, Dept. of Labor, Washington, D.C.; Gary M. Ford, General Counsel, Peter H. Gould, Deputy Assistant General Counsel, Kenton Hambrick, Attorney, Pension Benefit Guaranty Corporation, Washington, D.C.), *for the United States as Amicus Curiae.*

JUDITH A. GORDON, New York, N.Y., Assistant Attorney General of the State of New York (Robert Abrams, Attorney General of the State of New York) *for the State of New York as Amicus Curiae.*

ALTIMARI, *Circuit Judge*:

This case brings before us, for the second time, the question of whether the Long Island Railroad's ("LIRR") pension plan is a "governmental plan" within the meaning of section 3(32) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(32), and is therefore exempt from compliance with Title I of that

statute. *See* 29 U.S.C. § 1003(b)(1). The issue arises in the context of Mary Rose's suit for survivor's benefits, to which she claims entitlement pursuant to section 205(a) of ERISA, 29 U.S.C. § 1055(a). Following a remand from this court in 1982, the District Court for the Eastern District of New York (Bramwell, J.) held that ERISA did not apply to the LIRR Pension Plan because it was a "governmental plan." The district court accordingly granted defendants' motion for summary judgment and dismissed Rose's complaint for lack of subject matter jurisdiction.

We conclude that during the period of time relevant to this appeal, the LIRR Pension Plan was a "governmental plan," and we affirm the decision of the district court.

## BACKGROUND

The story of this litigation begins in 1976 with the death of Richard Rose. Rose had been employed as a clerk by the Long Island Railroad. Although he was fully vested in the LIRR Pension Plan ("the Plan") and had for some months been eligible to retire, Richard Rose was still working at the time of his death.

Under the Plan, Richard Rose was entitled to receive a "service-age" pension upon retirement, payable monthly for his lifetime without survivorship benefits. He also had the option of converting the "service-age" benefits into a pension of equivalent actuarial value, payable to the retiree for life and then to the surviving spouse for life. Under the terms of the Plan then in effect, the survivorship option had to be elected in writing at least six months prior to retirement or death. Had Richard Rose elected

this option, the monthly benefits payable during his own lifetime would have been reduced to reflect the future payments to his surviving spouse.

Richard Rose never elected the survivorship option. After he died, his widow, Mary Rose ("Rose"), applied to the LIRR for survivorship benefits. The Board of Managers of the Plan denied her application because her late husband had not made the required election. The decision of the Board of Managers was subsequently affirmed by the LIRR's Joint Board on Pension Applications.

On June 5, 1981, Rose commenced the instant action for survivor's benefits and other relief in the Eastern District of New York, alleging that the LIRR Pension Plan violated section 205 of ERISA, 29 U.S.C. § 1055. That section requires that all retirement plans covered by ERISA must provide benefits to the surviving spouses of employees who die before retirement. *Id.* § 1055(a)(2). These survivorship benefits are payable *unless* they are expressly waived by the employee. *See id.* § 1055(c)(1)(A). It is undisputed that Richard Rose never expressly waived survivorship benefits.

The district court concluded that the LIRR Plan was exempt from compliance with ERISA's vesting provisions because it was a "governmental plan" under 29 U.S.C. § 1002(32). On January 4, 1982, the district court dismissed Rose's complaint for lack of subject matter jurisdiction.

Rose appealed the dismissal of her complaint, and on September 28, 1982, this court reversed the decision of the district court. We noted that the language of the "governmental plan" exemption was ambiguous, and proceeded to examine the legislative history of ERISA in

order to determine whether Congress would have intended the LIRR Plan to be exempt from its coverage. We held that the LIRR Plan *was* subject to the vesting and participation requirements of ERISA, because such a holding would "not implicate any of the concerns that led Congress to exempt governmental employee benefit plans."

Following this court's reversal of the district court, defendants petitioned for rehearing. In support of the petition, both the State of New York and the United States of America filed briefs as amici curiae, taking the position that the LIRR Plan was an exempt "governmental plan." The panel granted rehearing on December 23, 1982, finding that "significant matters exist in this case that were not fully litigated in the district court and that, therefore, were not fully presented on appeal." These "significant matters" included the extensive state funding of the LIRR through the Metropolitan Transportation Authority, and the potential impact on state taxpayers if the LIRR Plan were required to comply with ERISA's funding requirements. Defendants argued that if the financial burden of ERISA compliance were to fall on the taxpayers, then the Congressional concerns behind the "governmental plan" exemption would indeed be implicated.

The panel accordingly vacated and withdrew its previously-issued opinion, vacated the decision of the district court and remanded "in order that [the significant] matters might be presented to and considered fully by the district court."

On remand, the parties engaged in extensive discovery. In April 1986, defendants moved for summary judgment,

still asserting that the LIRR Plan was exempt from ERISA coverage. Rose cross-moved for summary judgment in June 1986.

On September 26, 1986, Judge Bramwell issued a brief ruling from the bench, granting defendants' motion for summary judgment, denying plaintiff's cross-motion for summary judgment and once again dismissing her complaint. The district court held:

> After carefully considering the voluminous submissions of the parties in connection with these motions, the Court is again convinced, as it was back in December of 1981, that the LIRR Plan is and has been at all times relevant to this case a "governmental plan" as defined by Section 1002(32) of ERISA.

It is from this dismissal that Mary Rose now appeals.[1]

## DISCUSSION

### I. *The "Governmental Plan" Exemption from ERISA Coverage*

ERISA was enacted, after years of study, in order to remedy long-standing abuses and deficiencies in the private pension system. *See generally* H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in*, 1974 U.S. Code Cong. & Ad. News 4639. *See also* 29 U.S.C. § 1001. These

1 Following the 1982 remand, neither the United States nor the State of New York sought leave to intervene or to file amicus briefs. Subsequent to the argument of this appeal, however, and pursuant to a request by this court, the United States submitted a new amicus brief and the State of New York submitted a letter, reaffirming their positions that the LIRR Plan was an exempt governmental plan.

deficiencies included inadequate vesting provisions, insufficient assets to assure payment of future benefit obligations, and premature termination of under-funded benefit plans. *See id.*

Title I of ERISA, 29 U.S.C. §§ 1001 *et seq.*, contains various substantive and procedural requirements with which covered plans must comply. These include standards for vesting, funding and fiduciary responsibility, as well as the survivorship provision under which Mary Rose claims a right to benefits. Title II of ERISA is codified in the Internal Revenue Code, 26 U.S.C. §§ 401 *et seq.*, and contains requirements pertaining to the qualification of pension plans for favorable tax treatment. Title III, 29 U.S.C. §§ 1201 *et seq.*, contains ERISA's administrative and enforcement provisions. Title IV, 29 U.S.C. §§ 1301 *et seq.*, establishes the Pension Benefit Guaranty Corporation ("PBGC"), which guarantees the payment of benefits by plans which terminate with insufficient assets to pay those benefits.

Although Congress considered whether ERISA should apply to "public" or "governmental" benefit plans, it ultimately decided to exempt such plans from compliance with most of ERISA's requirements. *See* H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4647. Instead, Congress decided to undertake further study of the adequacy of public retirement plans, in order to determine "the necessity for Federal legislation and standards with respect to such plans." 29 U.S.C. § 1231(a)(3). To date, no such legislation has been enacted.

The governmental plan exemption was included for several reasons. First, it was generally believed that public plans were more generous than private plans with respect

to their vesting provisions. H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4667. Second, it was believed that "the ability of the governmental entities to fulfill their obligations to employees through their taxing powers" was an adequate substitute for both minimum funding standards and plan termination insurance. S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in*, 1974 U.S. Code Cong. & Ad. News 4890, 4965; H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in*, 1974 U.S. Code Cong. & Ad. News 4670, 4756-57. Finally, there was concern that imposition of the minimum funding and other standards "would entail unacceptable cost implications to governmental entities." H.R. Rep. No. 807, 1974 U.S. Code Cong. & Ad. News at 4830. *See also* H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4668.

This Congressional reluctance to interfere with the administration of public retirement plans is in part based on principles of federalism. For example, the report of the House Committee on Education and Labor stated:

> There are literally thousands of public employee retirement systems operated by towns, counties, authorities and cities in addition to the state and Federal plans. Eligibility, vesting, and funding provisions are at least as diverse as those in the private sector with the added uniqueness added by the legislative process. For this reason the Committee is convinced that additional data and study is necessary before any attempt is made to address the issues of vesting and funding with respect to public plans.

H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4647. *See also Feinstein v. Lewis*, 477 F. Supp. 1256,

1261 (S.D.N.Y. 1979) (purpose of ERISA governmental exemption was to "refrain from interfering with the manner in which state and local governments operate employee benefit systems"), *aff'd*, 622 F.2d 573 (2d Cir. 1980).

The governmental plan exemption from Title I coverage is codified at 29 U.S.C. § 1003(b)(1). "Governmental plan" is defined in 29 U.S.C. § 1002(32), which provides in pertinent part:

> The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

The sole issue on this appeal is whether the LIRR Pension Plan was an exempt "governmental plan" in 1976 when Mary Rose applied for survivorship benefits.

Rose raises a preliminary issue of statutory construction: she asserts that the phrase "by the government of any State or political subdivision thereof" should be interpreted as meaning *the government of any state or the government of a political subdivision of a state.* Under Rose's interpretation, a plan which was established or maintained by a political subdivision of a state would only be entitled to the exemption if the political subdivision were itself a *government*, for example a local government.

Defendants, on the other hand, argue that the phrase in question should be read as *the government of any state, or a political subdivision of any state.* Under this broader interpretation, a political subdivison would not have to be

a government itself in order for its benefit plan to be exempt from ERISA coverage. Rather, a plan which was established or maintained by any kind of political subdivision would qualify for the exemption.

We acknowledge that the statutory language is ambiguous; however, we are persuaded that defendants' interpretation is the correct one. Defendants' interpretation comports better with a common-sense reading of the statute, and also is a more logical interpretation. Section 1002(32) exempts not only plans "established or maintained . . . by the government of any State or political subdivision thereof," but also plans "established or maintained . . . by any agency or instrumentality of any of the foregoing." If, as Rose maintains, Congress enacted the exemption primarily to protect the autonomy of state and local *governments*, then it would not make sense to extend the exemption to state agencies and instrumentalities—which are not governments—while denying the exemption to public authorities.

Further support for defendants' interpretation is found in 29 U.S.C. § 1231, the provision which directs Congress to conduct further studies of public retirement plans. The benefit plans which Congress is directed to study include:

> retirement plans established and maintained or financed (directly or indirectly) by the Government of the United States, by any State (including the District of Columbia) or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

*Id.* § 1231(a). It is reasonable to assume that these plans are the same "governmental plans," as defined in

§ 1002(32), which are currently exempt from ERISA coverage under § 1003(b)(1).

Section 1231(a) uses the phrase "established and maintained . . . *by any State . . . or political subdivision thereof*" (emphasis added). This phrasing does not suffer from the ambiguity of the § 1002(32) definition. By omitting the words "the government of" before the clause "any state . . . or political subdivision thereof," section 1231(a) clearly encompasses *all* political subdivisions of states, whether or not they are *governments*. The clear meaning of § 1231(a) thus provides an additional key to interpreting the ambiguous language of § 1002(32).

Finally, *Feinstein v. Lewis*, *supra*, one of the few cases interpreting the governmental plan exemption, held that the exemption applied to employee benefit plans established and maintained by two different school districts. 477 F. Supp. at 1262. School districts are certainly not "governments," in any ordinary sense of the word.

We therefore conclude that a retirement plan is exempt from Title I of ERISA if it is established or maintained (1) by the government of a state; (2) by a political subdivision of a state; or (3) by an agency or instrumentality of either of the foregoing.

II. *The LIRR is an Agency or Instrumentality of the MTA, a Political Subdivision of the State of New York.*

The Long Island Railroad Company was chartered in 1834 as a private stock corporation, the purpose of which was to provide freight and passenger service to Long Island. In 1966, all of the LIRR's outstanding stock was acquired by the Metropolitan Transportation Authority

("MTA"). Since that time, no private individual has held any beneficial interest in the LIRR.

The district court held that the LIRR Plan was an exempt "governmental plan" because "the LIRR is an agency of at least the [MTA], and perhaps of the State of New York . . . [and] the MTA is a political subdivision of the State." We agree with the district court that the LIRR Plan fits the statutory definition of a "governmental plan."

A. *The Metropolitan Transportation Authority*

Because ERISA is a federal statute, the term "political subdivision" must be interpreted by reference to federal law, in the absence of clear legislative intent to the contrary. *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 602-03 (1971) (quoting *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62-63 (4th Cir. 1965)). Although the term "political subdivision" is not defined in ERISA, several different sources of authority point to the conclusion that the MTA, which wholly owns the LIRR, is a political subdivision of the State of New York.

In *Hawkins County*, the Supreme Court considered whether the respondent Utility District fell within the political subdivision exception to jurisdiction under the National Labor Relations Act. *See* 29 U.S.C. § 152(2). To guide its analysis, the Court adopted the NLRB's criteria, which "limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *Hawkins County*, 402 U.S. at 604-05.

The Court concluded that the Utility District was a political subdivison under the NLRB criteria. In further support of its decision the Court noted that the District had the power of eminent domain, was a public corporation under state law, and that the District's property and revenues were exempt from all state and local taxes. *Id.* at 606-07. *See also Popkin v. New York State Health & Mental Hygiene Facilities Improvement Corp.*, 547 F.2d 18 (2d Cir. 1976), *cert. denied*, 432 U.S. 906 (1977) (under the *Hawkins County* criteria, New York State public benefit corporation was political subdivision within the meaning of pre-1972 exemption from Title VII coverage).

The NLRB guidelines are a useful aid in interpreting ERISA's governmental exemption, because ERISA, like the National Labor Relations Act, "represents an effort to strike an appropriate balance between the interests of employers and labor organizations." H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4647. Under the *Hawkins County* analysis, the MTA is clearly a political subdivision of the state because it satisfies both of the alternate NLRB criteria. The MTA, a public benefit corporation, was created in 1965 by the Metropolitan Transportation Authority Act, N.Y. Pub. Auth. Law §§ 1260 *et seq. See id.* § 1263(1)(a). The purposes of the MTA are "the continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district." *Id.* § 1264(1). These purposes are "in all respects for the benefit of the people of the state of New York and the authority shall be regarded as performing an essential governmental function in carrying out its purposes and in exercising the powers granted by this title." *Id.* § 1264(2). Thus, the MTA meets the first

criterion because it was "created directly by the state, so as to constitute [a] department or administrative arm[ ] of the government." 402 U.S. at 604.

In addition, the MTA is administered by board members who are appointed by the governor with the advice and consent of the senate, and are removable by the governor. *N.Y. Pub. Auth. Law* §§ 1263(1)(a) & (7). Thus, the second NLRB criterion is satisfied because the MTA is "administered by individuals who are responsible to public officials or to the general electorate." 402 U.S. at 604-05.

Additional guidance is provided by two early but significant decisions of this circuit, *Commissioner of Internal Revenue v. Shamberg's Estate*, 144 F.2d 998 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945), and *Commissioner of Internal Revenue v. White's Estate*, 144 F.2d 1019 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945), which also required the court to determine whether a particular entity was a political subdivision. *See Philadelphia National Bank v. United States*, 666 F.2d 834, 837 (3d Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982) (terming *Shamberg* and *White* the leading cases on this issue).

*Shamberg* and *White* involved determinations of whether interest on bonds issued by the Port of New York Authority and the Triborough Bridge Authority, respectively, were exempt from federal taxation because the issuing entities were "political subdivisions" within the meaning of the controlling Revenue Acts. Both authorities were held to be political subdivisions, because they were created pursuant to state statute in order to carry out the traditionally public function of operating bridges and tunnels; moreover, the State had delegated certain of

its sovereign powers to the authorities, including the power of eminent domain and the police power.

Like the authorities in *Shamberg* and *White*, the MTA performs an "essential governmental function," N.Y. Pub. Auth. Law § 1264(2). It also possesses many other indicia of sovereignty. The MTA has the power of eminent domain, *id.* § 1267(1). Its property and revenues are exempt from all state and local taxes, *id.* § 1275. It may establish rules "for the conduct and safety of the public" which preempt local ordinances, *id.* § 1266(4), and the facilities, activities and operations of the MTA are not subject to the jurisdiction of any local authorities, *id.* § 1266(8).

We see no reason why the *Hawkins County* and *Shamberg* analyses should not apply to the term "political subdivision" as used in ERISA. We therefore conclude that the MTA is a political subdivision of the State of New York within the meaning of 29 U.S.C. § 1002(32).

B. *The Long Island Railroad*

(1)

The MTA acquired all the outstanding stock of the LIRR in 1966, pursuant to N.Y. Pub. Auth. Law § 1266(5), which permits the MTA to "cause any one or more of its powers, duties, functions or activities to be exercised or performed by, one or more wholly owned subsidiary corporations." Prior to 1966, the LIRR had been a private stock corporation owned by the Pennsylvania Railroad. The LIRR remained a stock corporation until 1980, when the MTA converted it into a public benefit corporation.

N.Y. Pub. Auth. Law § 1266(5) provides that the directors or members of the LIRR "shall be the same persons holding the offices of members of the [MTA]." In addition, the LIRR possesses "all of the privileges, immunities, tax exemptions and other exemptions of the [MTA]." *Id.* These include all the powers and privileges detailed in the previous section.

The MTA acquired the LIRR with funds loaned to it by the state. This loan was subsequently "repaid" by a 1967 state bond issue, a portion of the proceeds of which was appropriated to the MTA to repay the loan. The LIRR's sources of revenue include farebox receipts, freight and miscellaneous revenues, and substantial state and federal subsidies received through the MTA. Since its acquisition by the MTA, the LIRR's income from fares and freight has never been sufficient to meet its expenses, and it has operated at a substantial loss each year, prior to subsidies. For example, according to the 1976 MTA Annual Report, the LIRR had expenses of approximately $254 million but revenues of only $134 million in that year.

Each year, the LIRR prepares its budget for the following calendar year and submits it, along with its "projected operating and capital subsidy requirements, to the MTA for approval. The MTA then submits such of the LIRR's requests as it approves, along with its own operating and capital subsidy requirements, to the State Division of the Budget. Between 1967 and 1976, the LIRR received more than $450 million in subsidies through the MTA. In the Second Circuit opinion in *United Transportation Union v. Long Island Rail Road Co.*, 634 F.2d 19 (2d Cir. 1980), *rev'd on other grounds*, 455 U.S. 678 (1982), this court observed:

> [H]ad the MTA not taken over the operations of the LIRR in 1966, there probably would be no LIRR today. The substantial state and local funds used to subsidize the railroad attest to the fact that no private businessman would dare undertake the venture.

*Id.* at 28.

(2)

Like the term "political subdivision," the terms "agency" and "instrumentality" are not defined in ERISA, nor are there any regulations under ERISA which interpret these terms. The Internal Revenue Service, however, has had occasion to define "agency or instrumentality" under 26 U.S.C. § 414(d). That section was added to the Internal Revenue Code by Title II of ERISA and defines those "governmental plans" which are exempt from certain qualification requirements for favorable tax treatment. *See* 26 U.S.C. §§ 410(c)(1)(A), 411(e)(1)(A), and 412(h)(3). The definition of "governmental plan" in § 414(d) is virtually identical to the definition in 29 U.S.C. § 1002(32).

In interpreting the § 414(d) exemption, the IRS has consistently relied on Revenue Ruling 57-128, 1957-1 C.B. 311, which lists six factors to be considered in determining whether a particular entity is an agency or instrumentality:

> In cases involving the status of an organization as an instrumentality of one of more states or political subdivisions, the following factors are taken into consideration: (1) whether it is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on

> behalf of one or more states or political subdivisions; (3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner; (4) whether control and supervision of the organization is vested in public authority or authorities; (5) if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and (6) the degree of financial autonomy and the source of its operating expenses.

Because the IRS is one of the agencies charged with administering ERISA, its interpretations of the statute are entitled to great deference. *See Hawkins County*, 402 U.S. at 605; *Belland v. Pension Benefit Guaranty Corp.*, 726 F.2d 839, 843 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984). As evidenced by the discussion in the previous section, the LIRR satisfies all six of the IRS criteria: (1) the LIRR serves an "essential governmental function," *see* N.Y. Pub. Auth. Law §§ 1264(2), 1266(5); (2) it performs its function on behalf of the State of New York, *id.*; (3) it is wholly owned by the MTA, a governmental entity, *id.* § 1266(5); (4) it is controlled by the same public appointees who are members of the MTA, *id.* §§ 1263(1)(a), 1266(5); (5) the LIRR performs functions delegated to it by the MTA pursuant to express statutory authority, *id.* § 1266(5); and (6) the LIRR is heavily dependent on state subsidies to meet its operating expenses.

Finally, the reasons for exempting governmental plans from ERISA apply with equal force to the LIRR. The LIRR has been, in effect, a state-owned railroad since 1966 when it was acquired by the MTA. Every year since then, the LIRR has received massive state operating subsidies. LIRR employees, therefore, like other governmental employees, can depend on the state's taxing power to protect their right to retirement income. *See* H.R. Rep. No. 807, 1974 U.S. Code Cong. & Ad. News at 4756-57. Moreover, in light of the state's past practice of funding the LIRR's operating deficits, any additional costs imposed on the LIRR as a result of complying with ERISA would most likely be borne, at least to some extent, by New York taxpayers. *See* H.R. Rep. No. 807, 1974 U.S. Code Cong. & Ad. News at 4830.

Rose argues that this history of state funding is irrelevant to the question of the LIRR Plan's status, because the state is not legally obligated to fund the LIRR. Rather, Rose asserts, "such subsidy is a policy choice made by the state on a year to year basis, and there is no guarantee that the policy will not be changed in any subsequent year." Rose is correct about the non-obligatory nature of the state funding, but her argument ignores the fact that many governmental services are funded in the same manner.

As a practical matter, the State of New York has demonstrated its commitment to sustain the LIRR for the past twenty years, and reinforced its commitment in 1980, when the MTA converted the LIRR into a public benefit corporation. For all the foregoing reasons, we adopt the

IRS criteria and conclude that the LIRR is an "agency or instrumentality" of the MTA under 29 U.S.C. § 1002(32).

III. *The Meaning of "Established or Maintained."*

On this appeal, Rose raises a new issue of statutory interpretation which we also must address. She asserts that the clause of § 1002(32) which provides that a governmental plan is one "established *or* maintained" (emphasis added) by a governmental entity, should be read instead as established *and* maintained. Furthermore, she claims that the LIRR Plan was not both established *and* maintained by a qualified governmental entity, and therefore should not benefit from the governmental plan exemption.

Rose's interpretation of the "established or maintained" language in 29 U.S.C. § 1002(32) derives from the definition of "governmental plan" in Titles II and IV of ERISA. Title II, as discussed earlier, defines governmental plans in the context of an exemption from certain plan qualification requirements. *See* 26 U.S.C. § 414(d). The Title II definition is identical to the Title I definition *except* that it uses the phrase "established and maintained." The "established and maintained" language is also used in Title IV of ERISA, *see* 29 U.S.C. § 1321(b)(2), in which governmental plans are exempted from the plan termination and insurance requirements of that Title. Finally, Rose points out that certain other ERISA definitions use the "established and maintained" language. *See, e.g.*, 29 U.S.C. § 1002(33) ("church plan").

Rose concludes that the use of "established or maintained" in 29 U.S.C. § 1002(32) was simply the result of "congressional inadvertence," and that the Title I defini-

tion should be read consistently with the other definitions of governmental plan, as "established and maintained." Rose neglects to mention, however, that several other ERISA definitions use the "established or maintained" language. *See* 29 U.S.C. § 1002(1) (definition of "welfare plan"); *id.* § 1002(2)(A) (definition of "pension plan"); *id.* § 1002(16)(B) (definition of "plan sponsor"); and *id.* § 1002(40)(A) (definition of "multiple employer welfare arrangement").

Nothing in the legislative history of ERISA offers a clue as to the significance, if any, of the inconsistent definitions of governmental plan. In the *Feinstein* case, 477 F. Supp. 1256, the district court took note of the discrepancy but decided to interpret the "established or maintained" language of 29 U.S.C. § 1002(32) according to its literal meaning. *Id.* at 1260 & n.6.

It is a fundamental principle of statutory construction that the starting point must be the language of the statute itself. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). "[A]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

On the other hand, "a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983). *Cf. Swaida v. IBM Retirement Plan*, 570 F. Supp. 482 (S.D.N.Y. 1983) (declining to apply literal meaning of "year of service" definition in section 203(b)(2)(A) of

ERISA, 29 U.S.C. § 1053(b)(2)(A)), *aff'd*, 728 F.2d 159 (2d Cir.) (per curiam), *cert. denied*, 469 U.S. 874 (1984). Courts have interpreted "or" as meaning "and," and vice versa, in order to carry out the legislative intent of a statute. *See United States v. Moore*, 613 F.2d 1029, 1039-40 & nn. 84-86 (D.C. Cir. 1979) (collecting cases), *cert. denied*, 446 U.S. 954 (1980).

Rose argues that adopting the literal meaning of "established or maintained" would lead to anomalous results which are inconsistent with the purpose of the governmental exemption. For example, a plan which was originally established by a governmental body but subsequently taken over by a private entity would continue to qualify for the exemption, despite the fact that the now-private plan would no longer be backed by the security of the government's taxing power. We agree with Rose that this result indeed seems to conflict with Congress' goal of "remedy[ing] certain defects in the private retirement system." H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4639. *See also* 29 U.S.C. § 1001.

Unfortunately, the "established and maintained" reading leads to an equally anomalous result. If a plan is required to have been both established *and* maintained by a governmental entity in order to qualify for exemption, then a plan which was established by a private entity but subsequently taken over by a governmental body would continue to be subject to ERISA. This outcome conflicts with the federalism-based concerns which led Congress to exempt governmental plans in the first place.

The fact that both versions of the governmental plan definition lead to seemingly incongruous results makes the discrepancy all the more troubling. The PBGC, which

administers Title IV of ERISA, has resolved the dilemma by not construing the "established" requirement strictly where to do so would frustrate congressional intent. Thus the PBGC's position is that "a pension plan maintained by a public agency or political subdivision which has been taken over from a private business is excluded from the provisions of Title IV." PBGC Op. Ltr. 75-44 (December 8, 1975). We find the PBGC's approach to be a sensible one; the status of the entity which currently maintains a particular pension plan bears more relation to Congress' goals in enacting ERISA and its various exemptions, than the status of the entity which established the plan.

In any event, even if we agreed with Rose that the correct interpretation of § 1002(32) was *established and maintained*, we would still not conclude that the LIRR Plan was covered by ERISA, because the Plan was in fact established *and* maintained by the LIRR.

Rose herself concedes that the Plan is maintained by the LIRR. The Plan is funded by the LIRR and administered by a five-person Board of Managers, the members of which are appointed by the LIRR Board of Directors. The Board of Managers reviews applications for pension benefits. In the case of employees covered by collective bargaining agreements (or their beneficiaries), review of an unfavorable benefits decision may be obtained from the Joint Board on Pension Applications. The Joint Board, in turn, is comprised of three members of the Board of Managers and two Union representatives named by the LIRR Labor Council.

Rose contends, however, that the Plan was not established by the LIRR, but by the Pennsylvania Railroad in 1938. When the Pennsylvania Railroad owned the LIRR,

it established the "Plan for Supplemental Pensions." In 1971, in fulfillment of its collective bargaining agreements, the LIRR replaced the Plan for Supplemental Pensions with the current "Long Island Rail Road Company Pension Plan" by amending the former plan in its entirety. The LIRR did not "terminate" the Plan for Supplemental Pensions, because termination of a plan triggers the immediate vesting of all accrued benefits and distribution of plan assets. *See* 26 U.S.C. § 411(d)(3); 26 C.F.R. § 1.401-6; *Donovan v. UMIC, Inc.*, 580 F. Supp. 1455 (S.D.N.Y. 1984). According to the IRS regulations, replacement of a plan with a comparable plan does not constitute a "termination." 26 C.F.R. § 1.401-6(b)(1).

Rose asserts that the LIRR Plan was not "established" by the LIRR within the meaning of ERISA, because the Plan for Supplemental Pensions was not formally "terminated." Defendants argue that Rose's interpretation is overly restrictive and inconsistent with the legislative purpose behind the governmental plan exemption.

Defendant's position is consistent with *Feinstein v. Lewis*, which held that a benefit plan was "established" by a governmental entity even though it was created pursuant to collective bargaining, rather than by statute or other unilateral government action. In *Feinstein*, the district court observed that "Congress, in exempting governmental plans, was concerned more with the governmental nature of public employees and public employers than with the details of how a plan was established or maintained." 477 F. Supp. at 1262.

We agree with defendants that under the facts of this case, where the LIRR was acquired by a public entity and its former pension plan was amended in its entirety, the

LIRR Plan was "established" by the LIRR. A broad reading of the term "established"—whereby a new plan may be established under ERISA without the preexisting one having been formally "terminated"—is more consistent with the legislative intent behind the governmental plan exemption.

## CONCLUSION

The LIRR Plan under which Richard Rose was covered at the time of his death was both established and maintained for its employees by the Long Island Railroad Company. The LIRR is an agency or instrumentality of the MTA, which in turn is a political subdivision of the State of New York, within the meaning of 29 U.S.C. § 1002(32). We hold that when Mary Rose applied for benefits in 1976, the LIRR Plan was a governmental plan under 29 U.S.C. § 1003(b)(1) and therefore exempt from compliance with Title I of ERISA. The decision of the district court is hereby affirmed.

APPENDIX B

Opinion of the United States District Court for the Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----------------------------------x

MARY ROSE, :

81 C 1835

Plaintiff, :

- against - :

L.I.R.R. PENSION PLAN, :

Defendant. :

-----------------------------------x

United States Courthouse
Brooklyn, New York

September 26, 1986
10:00 a.m.

B E F O R E :

HONORABLE HENRY BRAMWELL, U.S.D.J.

PETER CHARUKA
OFFICIAL COURT REPORTER

EASTERN DISTRICT COURT REPORTERS
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 330-7687

THIS PAGE INTENTIONALLY LEFT BLANK.

A P P E A R A N C E S :

EDGAR PAUK, ESQ.
Attorney for plaintiff
Legal Services for the Elderly
132 West 43 Street
New York, New York 10036

BRAVERMAN & ROSEN, ESQS.
Attorneys for plaintiff
67 Wall Street
New York, New York 10006

BY: DAVID S. PREMINGER, ESQ.

SEWARD & KISSEL, ESQS.
Attorneys for defendant
Wall Street Plaza
New York, New York 10005

BY: EUGENE P. SOUTHER, ESQ.
MARK J. HYLAND, ESQ.
DAN J. SCHULMAN, ESQ.

EASTERN DISTRICT COURT REPORTERS
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 330-7687

THE COURT: I will put the Court's decision on the record.

This case, on remand pursuant to an order of the United States Court of Appeals for the Second Circuit, requires an interpretation of the "governmental plan" exemption from the Employee Retirement Income Security Act, 29 U.S.C. Section 1002(32) and 1003(b)(1) (ERISA). The relevant facts of the case are not in dispute, and are set forth in prior decisions of this Court and the Second Circuit.

On December 11, 1981, this Court granted defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, the Court finding that the Long Island Rail Road Pension Plan was a "governmental plan" as defined by Section 1002(32) of ERISA. On September 28, 1982, the Court

of Appeals for the Second Circuit reversed, holding that the LIRR Plan was not a governmental plan for the purposes of ERISA. However, on December 23, 1982, the Second Circuit granted rehearing of its September 28, 1982 decision, vacated that decision, and remanded to this Court for further consideration of the issue of whether the LIRR Plan falls within the "governmental plan" exemption contained in Section 1002(32) of ERISA. This morning, the parties cross-move for summary judgment.

Section 1002(32) defines a "governmental plan" as "a plan established or maintained for its employees by the Government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

After carefully considering the

voluminous submissions of the parties in connection with these motions, the Court is again convinced, as it was back in December of 1981, that the LIRR Plan is and has been at all times relevant to this case a "governmental plan" as defined by Section 1002(32) of ERISA. Although there still appears to be no case law directly on point, the Court is persuaded that judicial determinations of analogous federal statutes -- which appear on their faces to provide narrower exemptions than ERISA -- weigh heavily in favor of defendants' position in the present case. See, e.g., NLRB v. National Gas Utility District of Hawkins County, 402 U.S. 600 (1971)(interpreting the "political subdivision" exception to the Labor Management Relations Act); Popkin v. New York State Health & Mental Hygiene Facilities Improvement Corp., 547 F.2d 18 (2nd Cir. 1976),

cert. denied, 432 U.S. 906 (1977) (interpreting "political subdivision " exception to Title VII of the Civil Rights Act of 1964); Capers v. LIRR, 72 Civ. S 3168 Report & Recommendation of Magistrate Raby dated April 9, 1981) (finding the LIRR a "political subdivision" within the meaning of Title VII); Commissioner v. Shamberg's Estate, 144 F.2d 998 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945) (finding the Port Authority a "political subdivision" within the meaning of the Internal Revenue Code); Commissioner v. White's Estate, 144 F.2d 1019 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945) (finding the Triborough Bridge Authority a "political subdivision" within the meaning of the Internal Revenue Code).

Furthermore, the plain language and legislative history of the ERISA exemption, as cited by the parties, on balance points

decidedly to the conclusion that the LIRR Plan falls within the exemption. Finally, the Court is persuaded by the positions of the U.S. Department of Labor, the U.S. Department of Treasury, and the Pension Benefit Guaranty Corporation urging that the LIRR Plan be exempted from ERISA.

Considering the foregoing authority, along with all of the arguments and submissions of the parties, the Court again concludes that the LIRR is an agency of at least the Metropolitan Transportation Authority, and perhaps of the State of New York; that the MTA is a political subdivision of the State; and that the LIRR Pension Plan should therefore be exempt as a "governmental plan" within the meaning of Section 1002(32) of ERISA.

Accordingly, defendant's motion for summary judgment dismissing the complaint is

GRANTED, plaintiff's cross-motion for summary judgment is DENIED, and the case is DISMISSED.

Settle an order on notice on or before October 10, 1986.

(Conclusion of proceedings.)

APPENDIX C Original Opinion by Second Circuit Court of Appeals (later vacated)

# UNITED STATES COURT OF APPEALS

## FOR THE SECOND CIRCUIT

No. 1322—August Term, 1981

(Argued August 11, 1982 Decided September 28, 1982)

Docket No. 82-7026

MARY ROSE,

*Plaintiff-Appellant,*

—v.—

THE LONG ISLAND RAILROAD PENSION PLAN, et al.,

*Defendants-Appellees.*

Before:

VAN GRAAFEILAND and PIERCE, *Circuit Judges,* and MARKEY, *Chief Judge,* United States Court of Customs and Patent Appeals.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, Henry

* Sitting by designation.

Bramwell, *J.*, finding that the Long Island Railroad Pension Plan is a "governmental plan" and thus exempt from compliance with the standards for participation and vesting imposed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, and dismissing plaintiff's complaint for lack of subject matter jurisdiction.

Reversed and remanded.

JONATHAN WEISS, New York, New York (Legal Services for the Elderly, New York, New York; Edgar Pauk, of counsel), for *Plaintiff-Appellant.*

ROGER J. SCHIERA, Jamaica, New York (Angelo Granatelli, Jamaica, New York, of counsel), for *Defendants-Appellees.*

PIERCE, *Circuit Judge*:

Plaintiff Mary Rose is the widow of Richard Rose, who at the time of his death on January 7, 1976, was a Long Island Railroad ("LIRR") employee,[1] and a fully vested participant in the Long Island Railroad Pension Plan ("LIRR Plan" or "the Plan").[2] Although Richard Rose

---

1 It is not claimed that Richard Rose's death was related to his employment—he died of leukemia.

2 Article II, § 7 of the LIRR Plan states that "[e]xcept as otherwise herein provided, an Employee who has accumulated at least 240 calendar months of Credit Service shall have a vested right to a Service-Age Pension under the terms of this Plan as in effect at that

had been eligible, since August 1975, to retire with a "service-age pension" based on his age and 26 years of service with the LIRR,[3] he never did so.

The LIRR adopted the LIRR plan in 1971 in order to fulfill its collective bargaining agreements and provide pensions for all of its employees. In 1974, the plan was amended to the form that was in effect at the time of Richard Rose's death.[4]

It is uncontested that Richard Rose did not at any time file the form necessary to elect the survivor option available under the LIRR Plan,[5] and that plaintiff's applica-

---

time. Such Service-Age Pension shall not be payable prior to his retirement and attainment of age 50, and then only upon receipt of appropriate application therefor."

[3] At the time of his death Richard Rose was 50 years old.

Article II, § 2 of the LIRR Plan provides, in pertinent part, as follows:

"SECTION 2. *Service-Age Pension Eligibility.* An employee shall be eligible to retire on a Service-Age Pension if:

(a) he has attained age 50 and has accumulated at least 240 calendar months of Credited Service."

[4] Subsequent to Mr. Rose's death, the LIRR Plan was amended, and the survivor's benefits election provisions contained therein were altered. According to plaintiff, they are no longer in conflict with ERISA's requirements.

[5] Article II of the LIRR Plan governs employees' eligibility for, and the vesting of, annuity, death, and disability benefits. Article II, § 8 of the LIRR Plan provides that once an employee's pension rights become vested, that employee may elect a "survivor option". If this option is elected, the annuity to which the employee is otherwise entitled is converted into a joint and survivor annuity of equal actuarial value. The employee will then receive a reduced monthly benefit, which, rather than terminating upon the employee's own death, will continue to be paid until the death of the employee's surviving spouse. Article II, § 8(d) of the LIRR Plan also provides that in order for an employee's election of the survivor option to be effective, it must be made in writing, on a designated form, at least 183 days prior to retirement. An election becomes effective on the first day

tion for survivor's benefits was denied by the Board of Managers of the LIRR Plan as a result of this failure. Plaintiff appealed the decision denying her these benefits, which she believed to be due to her as the surviving spouse of a vested participant in the LIRR Plan, to the Plan's Joint Board on Pension Applications. After the Joint Board affirmed the Board of Managers' decision, plaintiff filed the complaint in this action in the United States District Court for the Eastern District of New York. She contended therein, as she does in this Court, that the election provisions of Article II, section 8(d) of the LIRR Plan violated the express requirements of section 1055 of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA").[6] In short, she claimed that those provisions were invalid and could not

---

of the month that follows the date six months after the required form is filed with the Board of Managers of the LIRR Plan. If an employee files a notice electing the survivor option but dies prior to its effective date six months later, the election is void. If, on the other hand, an employee dies after his election of the survivor option becomes effective but before he actually retires, his spouse will begin to receive benefits at the time of the employee's death. An election may be rescinded on 183 days notice, but may not be rescinded after the electing employee retires.

6 29 U.S.C. § 1055 provides, in pertinent part, that

(a) If a pension plan provides for the payment of benefits in the form of an annuity, such plan shall provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity.

* * *

(e) A plan shall not be treated as satisfying the requirements of this section unless, under the plan, each participant has a reasonable period . . . before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this subsection) not to take such joint and survivor annuity.

be invoked to deprive her of pension benefits which she contended were due to her as a surviving spouse.[7]

Defendants responded to the complaint by moving, pursuant to Rule 12(b)(6), Fed.R.Civ.P., for an order dismissing the case for lack of subject matter jurisdiction. They contended in their motion that the LIRR Plan was a "governmental plan" as that term is defined in section 1002(32) of ERISA, and that, as such, the LIRR Plan was exempt from the participation and vesting requirements applicable to pension plans governed by ERISA. After hearing argument on defendants' motion, and on plaintiff's cross-motion for summary judgment, the court below found that the LIRR Plan was a "governmental plan" under 29 U.S.C. § 1002(32). Therefore, the court found, the LIRR Plan was exempt from compliance with the ERISA provisions on which plaintiff based her claim. Consequently, the court denied plaintiff's motion for summary judgment, granted defendants' Rule 12(b)(6) motion, and dismissed plaintiff's complaint. Plaintiff appeals from that order.

The sole issue before the Court on this appeal is whether the district court was correct in its conclusion that the LIRR Plan is a "governmental plan" as that term is defined in section 1002(32) of ERISA. We believe that the district court was incorrect, and we reverse.

*The LIRR*

The LIRR was chartered in 1834 as a private stock corporation, the purpose of which was to provide freight

---

[7] Plaintiff's complaint originally asserted claims under both ERISA and the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* ("LMRA"). The District Court found that the LIRR was not subject to the provisions of the LMRA and dismissed plaintiff's LMRA claims. Plaintiff does not appeal this disposition of the LMRA claims.

and passenger service to Long Island. In 1966, all of the LIRR's outstanding stock was acquired by the Metropolitan Transportation Authority ("MTA"), which used funds loaned to it by the State of New York to finance the purchase.

The MTA was created in 1965, pursuant to N.Y. Pub. Auth. L. § 1260 *et seq.*, in order to insure the "continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district." N.Y. Pub. Auth. L. § 1264(1). The MTA is, according to state law, "a body corporate and politic constituting a public benefit corporation." N.Y. Pub. Auth. L. § 1263(1)(a). Its members are appointed by the Governor of the State of New York with the advice and consent of the Senate. *Id.* It has the power, *inter alia,* to borrow money and issue bonds, N.Y. Pub. Auth. L. § 1265(3); to collect such fares and tolls as are necessary to maintain the combined operations of the authority and its subsidiary corporations on a self-sustaining basis, N.Y. Pub. Auth. L. § 1266(3); to establish rules and regulations governing the conduct and safety of the public making use of MTA transportation facilities, which, in case of a conflict, supersede local laws, ordinances and regulations, N.Y. Pub. Auth. L. § 1266(4); to exercise, within certain limits, the state's power of eminent domain, N.Y. Pub. Auth. L. § 1266(9)(b); and to "acquire, hold, own, lease, establish, construct, . . . any of its facilities through, and cause any one or more of its powers, duties, functions or activities to be exercised or performed by, one or more wholly owned subsidiary corporations of the authority. . . ." N.Y. Pub. Auth. L. § 1266(5). It was pursuant to this last power that the MTA acquired the LIRR.

Under New York law,

> [t]he directors or members of each such subsidiary corporation shall be the same persons holding the offices of members of the authority. Each such subsidiary corporation . . . shall have all of the privileges, immunities, tax exemptions and other exemptions of the authority . . . . Each such subsidiary corporation shall be subject to the restrictions and limitations to which the authority may be subject.

N.Y. Pub. Auth. L. § 1266(5). Thus, the LIRR, as a wholly owned subsidiary of the MTA, has the same privileges and immunities as the MTA itself.

The employment relationship between the LIRR and its employees is also governed by the New York Public Authorities Law. Section 1265(9) of that law states that "no officer or employee of a subsidiary corporation of the authority, other than a public benefit subsidiary corporation, shall be a public officer or a public employee." Although the MTA could have converted the LIRR into a public benefit corporation pursuant to N.Y. Pub. Auth. L. § 1266(5) at any time after its acquisition of the LIRR in 1966, it did not make this change until February, 1980, when it did so in the hope that the conversion would bring the LIRR's employees under the anti-strike provisions of N.Y. Civil Service Law § 210 ("the Taylor Law"). *United Transportation Union v. Long Island Rail Road Co.*, 71 L.Ed. 2d 547, 551 (1982). In addition, § 1266(5) of the New York Public Authorities Law states that "[t]he employees of any such subsidiary corporation [of the MTA], except those who are also employees of the authority, shall not be deemed employees of the authority." Thus, as the Supreme Court stated in *United Transportation Union*, at all times after the LIRR became a

wholly owned subsidiary of the MTA, "Railroad employees were not eligible for any of the retirement, insurance or job security benefits of state employees." 71 L.Ed. 2d at 556-57.

*The "Governmental Plan" Exemption*

Although ERISA applies to virtually all employee benefit plans established or maintained for the benefit of employees of employers "engaged in commerce or in any industry or activity affecting commerce", 29 U.S.C. § 1003(a), an employee benefit plan that is a "governmental plan" is exempt from the requirements of ERISA. 29 U.S.C. § 1003(b)(1). Title 29 U.S.C. § 1002(32), in turn, defines a "governmental plan" as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." Both plaintiff and defendants contend that the section 1002(32) definition of a "governmental plan" is clear and unambiguous, and neither requires, nor, in fact, allows for, any extensive exercise in statutory interpretation or analysis of the legislative history of ERISA. However, plaintiff and defendants are not in agreement as to what is the meaning of this allegedly clear and unambiguous statute. Plaintiff contends that the words, "the government of any State or political subdivision thereof," must be read together, and that these words mean that an employee benefit plan is not a "governmental plan" unless it is a plan established or maintained by the *government* of a state or by the *government* of a political subdivision of a state. Thus, the definition would include a plan maintained by the government of a city or township. An agency or instrumentality of a city government would also be included within the

definition by virtue of the "agency or instrumentality" language quoted above. However, plaintiff argues, the definition does not include the LIRR, because it is not itself the *government* of either a state or a political subdivision of a state. Neither is it an "agency or instrumentality" of a *government* of a state or of a political subdivision of a state, since the MTA, even if it *is* a political subdivision of a state, is *not* the *government* of a state or of a political subdivision of a state.[8]

Defendant contends, on the other hand, that plaintiff's reading of the statutory definition of "governmental plan" is narrow, "tortured", and "fanciful". Defendants argue that the statutory definition must be read disjunctively, and that it clearly includes a political subdivision of the government of a state; that the MTA is a political subdivision of the State of New York; and that the LIRR is, at minimum, an "agency or instrumentality" of the MTA.[9] Thus, defendants claim, the LIRR falls squarely within the section 1002(32) definition of a "governmental plan".

Even if defendants are correct as to the proper reading of section
1002(32), their argument cannot succeed unless the MTA, or the LIRR, or both, are political subdivisions of the State of New York. Defendants state correctly in this regard that the determination as to whether or not these entities are political subdivisions within the meaning of ERISA, a federal statute, is governed by federal, rather

8 Plaintiff does not deny that the MTA probably does fall within the § 1002(32) definition, since the MTA would appear to be an agency or instrumentality of the government of the State of New York.

9 Defendants also argue that the LIRR itself is a political subdivision of New York State, but acknowledge that the district judge found only that the LIRR was an agency or instrumentality of the MTA.

than state law. *NLRB v. Natural Gas Utility District of Hawkins County, Tenn.*, 402 U.S. 600, 602-03 (1971) ("*Hawkins*"); *Popkin v. New York State Health & Mental Hygiene Facilities Improvement Corp.*, 547 F.2d 18, 19 (2d Cir. 1976), *cert. denied*, 432 U.S. 906 (1977); *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 63 (4th Cir. 1965). Defendants refer us to the National Labor Relations Board and Equal Employment Opportunity Commission criteria for defining an employer as a political subdivision.[10] Application of these criteria does, as

---

10 Under the National Labor Relations Board's ("NLRB") criteria, an employer is within the "political subdivision" exemption from the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("NLRA"), if (1) it was created directly by the state so as to constitute a department or administrative arm of the government, or (2) it is administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Natural Gas Utility District of Hawkins County, Tenn.*, 402 U.S. 600, 602-03 (1971). In *Hawkins* the Supreme Court applied these criteria to determine whether a local utility district was exempt from the coverage of the NLRA, without explicitly approving their use in other cases.

Applying the NLRB criteria, the MTA clearly is a political subdivision of the State of New York. The MTA was created by N.Y. Pub. Auth. L. § 1263(1)(a). The Public Authorities Law states, in § 1264(2), that the MTA's "purposes are in all respects for the benefit of the people of the state of New York," and that "the authority shall be regarded as performing an essential governmental function in carrying out its purposes and in exercising the powers granted by this title." In addition, the MTA is administered by board members who are both appointed by, and subject to removal by a public official, the Governor of New York. N.Y. Pub. Auth. L. §§ 1263(1), (7). Since the LIRR is administered by the same board members as is the MTA, N.Y. Pub. Auth. L. § 1266(5), it too would seem to be a political subdivision under the NLRB criteria. However, this finding is not dispositive of whether the LIRR is a "political subdivision" within the terms of ERISA. The NLRB criteria reflect the NLRB's "familiarity with labor problems and its experience in the administration of the [NLRA]." *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62 (4th Cir. 1965). The NLRB has no such expertise in relation to ERISA. The NLRB criteria also reflect a clear Congressional intent to except the labor relations of federal, state, and local governments, whose employees "did not usually enjoy the right to strike" from coverage by the NLRA. *Hawkins, supra*, 402 U.S. at 604. *See also Crilly v. South*

defendants contend, lead to the conclusion that both the LIRR and the MTA are political subdivisions. However, because neither the National Labor Relations Board nor the Equal Employment Opportunity Commission is an expert agency with regard to the participation and vesting requirements imposed by ERISA, we are not persuaded that the National Labor Relations Board criteria are applicable to the determination of what constitutes a "political subdivision" within the terms of ERISA. However, we believe, in any case, that the language of 29 U.S.C. § 1002(32) is ambiguous, and that it may well be that plaintiff is correct in her assertion that if the LIRR is to fall within the statutory definition of a governmental subdivision it must be either "the *government* . . . of a political subdivision," or an "agency or instrumentality" of such a *government*."[11] Therefore, we need not further examine and rule as to whether the LIRR is a "political subdivision" for purposes of ERISA. Instead, we must look on the one hand, to the legislative history and other sources for evidence of the Congressional intent as to the coverage of ERISA, and on the other hand, to the characteristics of the LIRR Plan, and of the LIRR as an employer, in order to determine whether Congress would have intended that ERISA cover the Plan involved in this case.

*ERISA*

Congress' primary purpose in passing ERISA was to protect individual pension rights. H.R. Rep. No. 533, 93d

---

*Eastern Penn. Transportation Auth.*, 529 F.2d 1355, 1360 (3d Cir. 1976). No such concern is relevant when interpreting exclusions from the coverage of ERISA.

11 Defendants do not contend that either the MTA or the LIRR is a government.

Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4639. The House Report which recommended passage of the bill stated that, "[i]ts most important purpose will be to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society." *Id., reprinted in* [1974] U.S. Code Cong. & Ad. News at 4646. In addition, "[m]embers of the families of employees are included in the class which ERISA protects . . . . Congress was concerned not only about the workers themselves whose employment entitles them to benefits. Congress was also concerned about the families of those workers who depend to the same degree on the actual availability of those benefits." *Stone v. Stone,* 450 F. Supp. 919, 926 (N.D. Cal. 1978), *aff'd,* 632 F.2d 740 (9th Cir. 1980), *cert. denied,* 453 U.S. 922 (1981). ERISA is thus a remedial statute, the coverage of which should be liberally construed, and exemptions from which should be confined to their narrow purpose. S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4854, 4854; *Connolly v. Pension Benefit Guaranty Corp.,* 581 F.2d 729, 732 (9th Cir. 1978), *cert. denied,* 440 U.S. 935 (1979).

The governmental plan exemption was incorporated into ERISA for several somewhat conflicting reasons. On the one hand, the enactment of minimum vesting and funding standards applicable to public plans was thought to be unnecessary since public plans were generally known to be generous with regard to vesting. Further, since "[s]tate and local governments and their taxing authority will be with us forever," H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong.

& Ad. News at 4667, the funding of public plans was generally regarded as adequate and secure. *Id.*; H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4670, 4756, 4830. On the other hand, since some governmental units had made generous pension plan promises, but had actually set aside very little money to pay these benefits, there was concern that the sudden imposition of a minimum funding requirement could create a considerable, and unreasonable, burden for taxpayers. H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4648; H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4670, 4756. Because of this concern with possible underfunding, and the possibility that imposing ERISA standards would entail unacceptable cost implications for governmental entities, the House Committees on Ways and Means and on Education and Labor, and the Senate Committees on Finance and on Labor and Public Welfare were directed to study the extent to which the enactment of federal legislation and standards with respect to governmental employee benefit plans would be desirable. H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4670, 4713; H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4647; 29 U.S.C. § 1231. To a certain extent both of the above concerns, and particularly the latter, are concerns of federalism: Congress was reluctant to impose possibly onerous standards on local governmental bodies which have their own peculiar local concerns and legislative processes with which to contend. *See Feinstein v. Lewis*, 477 F. Supp. 1256, 1261 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 573 (2d Cir. 1980); H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4647.

Because of the relationship between the LIRR and the State of New York, and because, under New York law, LIRR employees are not state employees, a holding that the LIRR Plan is not exempted from the vesting and participation requirements of ERISA will not implicate any of the concerns that led Congress to exempt governmental employee benefit plans from ERISA coverage. First, the LIRR Plan, and thus, LIRR employees, lack the protections that would be available if LIRR employees were considered state employees, and that would be available if the LIRR had the taxing power which Congress assumed would be available to meet the funding obligations of governmental plans exempted from ERISA coverage. For example, the New York Constitution, Art. 5, § 7, protects state employees from the loss of pension benefits. It provides that, "[a]fter July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." Under the LIRR Plan, however, provision is made for modification or termination of the Plan, and for the distribution of reduced benefits to Plan participants in case of such an event. *See* Article VIII of the LIRR Plan. In addition, the survivors of LIRR employees are ineligible for the state employee's survivor's benefits provided for in New York State Civil Service Law § 154.

Further, no statutory provision requires the State of New York to pay any LIRR operating deficits or other obligations (including pension plan obligations), that the LIRR is unable to meet. In fact, the MTA and its subsidiaries are directed to charge such fares, rates and tolls as are necessary to maintain the entire system on a self-sustaining basis. N.Y. Pub. Auth. L. § 1266(3).

This lack of any obligation on the part of New York State to fund any deficit in the LIRR's budget renders the second concern of Congress—that imposition of ERISA's standards would unduly burden local governments and their taxpayers—inapplicable to the LIRR Plan. In addition, the reluctance to tamper with the various nuances of state and local legislative processes is not relevant where a pension plan, like the LIRR plan, is the product of collective bargaining rather than of statutory enactment. Finally, concerns of federalism and of the possibility that regulation will endanger the "separate and independent existence" of a state, *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976), are simply irrelevant in a context in which a state denies that the employees involved are governmental employees at all.

The result of the decision below is to deprive plaintiff of the protections of ERISA on the basis that the LIRR Plan is a "governmental plan", while at the same time it is clear that under the laws of the State of New York plaintiff's husband was not a government employee, and therefore was not entitled to any of the rights or protection that would have accompanied such employment. Such a result is inconsistent with the remedial intent of Congress in passing ERISA.

We hold therefore, on the facts of this case, that the LIRR Plan is subject to the participation and vesting requirements of ERISA, and reverse the district court's order dismissing plaintiff's complaint for lack of subject matter jurisdiction. We need not, and do not, reach the question of whether the election provisions contained in Article II, § 8 of the LIRR Plan are invalid in light of 29 U.S.C. § 1055.

Reversed and remanded for further proceedings consistent with this opinion.

APPENDIX D

Order of the Court of Appeals for the Second Circuit Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Ciruit, held at the United States Courthouse, in the City of New York, on the 20th day of October, one thousand nine hundred and eight-seven.

86-7942

------------------------------------------x

MARY ROSE,

Plaintiff-Appellant,

-v-

LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSION APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustees of the Plan, T.P. MOORE and JOHN DOE, as members of the Plan Board of Managers, T.M. TARANTO, J.B. HUFF and H.J. LIBERT, as members of the Plan Board of Managers, and the Joint Board on Pension Applications, E. YULE, W. STYZIAK, and J. BOVE as members of the Joint Board on pension Applications, and the LONG ISLAND RAILROAD,

Defendants-Appellees.

------------------------------------------x

(Filed October 20, 1987, Elaine B. Goldsmith, Clerk)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant Mary Rose.

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/______________________
Elaine B. Goldsmith
Clerk

## APPENDIX E: Relevant Constitutional and Statutory Provisions

## EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

(1) 29 U.S.C. § 1001 et seq.

SUBCHAPTER 1 - PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle A - General Provisions

§ 1001. Congressional findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the

successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safe-guards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues

of the United States because they are afforded preferential Federal tax treatment; tha despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable

character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the

soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

§ 1002. Definitions

For purposes of this subchapter:

. . . .

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

. . . .

(32) The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or

political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act.

§ 1003. Coverage

....

(b) The provisions of this subchapter shall not apply to any employe benefit plan if -

(1) such plan is a governmental plan (as defined in section 1002(32) of this title):

§ 1055. Joint and survivor annuity requirement

Form of payment of annuity benefits

(a) If a pension plan provides for the payment of annuity, such plan shall provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annity.

....

Election to take annuity

(e) A plan shall not be treated as satisfying the requirements of this section unless, under the plan, each participant has a reasonable period (as prescribed by the Secretary of the Treasury by regulations) before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this

subsection) not to take such joint and survivor annuity.

§ 1231. Congressional study

(a) The Committee on Education and Labor and the Committee on Ways and Means of the House of Representatives and the Committee on Finance and the Committee on Labor and Public Welfare of the Senate shall study retirement plans established and maintained or financed (directly or indirectly) by the Government of the United States, by any State (including the District of Columbia) or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. Such study shall include an analysis of-

(1) the adequacy of existing levels of participation, vesting, and financing arrangements,

(2) existing fiduciary standards, and

(3) the necessity for Federal legislation and standards with respect to such plans.

In determining whether any such plan is adequately financed, each committee shall consider the necessity for minimum funding standards, as well as the taxing power of the government maintaining the plan.

§ 1321. Plan covered

(a) Except as provided in subsection (b) of this section, this section applies to any plan (including a successor plan) which, for a plan year-

....

(b) This section does not apply to any plan-

....

(2) established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, or to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions required under that Act,

....

(2) 26 U.S.C. § 414(d)

§ 414. Definitions and special rules

(d) Governmental plan. - For purposes of this part, the term "governmental plan" means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also

includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act (59 Stat. 669).

NEW YORK CONSTITUTION

Article V, Section 7

After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

NEW YORK PUBLIC AUTHORITIES LAW

§ 1265. General powers of the authority

Except as otherwise limited by this

title, the authority shall have power.

. . . .

9. (a) Notwithstanding section one hundred thirteen of the retirement and social security law or any other general or special law, the authority and any of its subsidiary corporations may continue or provide to its affected officers and employees any retirement, disability, death or other benefits provided or required for railroad personnel pursuant to federal or state law. Nothwithstanding any provisions of the civil service law, no officer or employee of a subsidiary corporation of the authority, other than a public benefit subsidiary corporation, shall be a public officer or a pubic employee;

(b) The authority and any of its public benefit subsidiary corporations may be a

"participating employer" in the New York state employees' retirement system with respect to one or more classes of officers and employees of such authority or any such public benefit subsidiary corporation, as may be provided by resolution of such authority or any such public benefit subsidiary corporation, as the case may be, or any subsequent amendment thereof, filed with the comptroller and accepted by him pursuant to section thirty-one of the retirement and social security law. In talking any action pursuant to this paragraph (b), the authority and any of its public benefit subsidiary corporations shall consider the coverage and benefits continued or provided pursuant to paragraph (a) of this subdivision.

§ 1266. Special powers of the authority

In order to effectuate the purposes of this title:

....

3. The authority may establish, levy and collect or cause to be established, levied and collected and, in the case of a joint service arrangement, join with others in the establishment, levy and collection of such fares, tolls, rentals, rates, charges and other fees as it may deem necessary, convenient or desirable for the use and operation of any transportation facility and related services operated by the authority or by a subsidiary corporation of the authority or under contract, lease or other arrangement, including joint service arrangements, with the authority. Any such fares, tolls, rentals, rates, charges or other fees for the transportation of passengers shall be estab-

lished and changed only if approved by resolution of the authority adopted by not less than a majority vote of the whole number of members of the authority then in office, with the chairman having one additional vote in the event of a tie vote, and only after a public hearing, provided however, that fares, tolls, rentals, rates, charges or other fees for the transportation of passengers on any transportation facility which are in effect at the time that the then owner of such transportation facility becomes a subsidiary corporation of the authority or at the time that operation of such transportation facility is commenced by the authority or is commenced under contract, lease or other arrangement, including joint service arrangements, with the authority may be continued in effect without such a hearing. Such fares, tolls, rentals, rates, charges

and other fees shall be established as may in the judgment of the authority be necessary to maintain the combined operations of the authority and its subsidiary corporations on a self-sustaining basis. The said operations shall be deemed to be on a self-sustaining basis as required by this title, when the authority is able to pay or cause to be paid from revenue and any other funds or property actually available to the authority and its subsidiary coprorations (a) as the same shall become due, the principal of and interest on the bonds and notes and other obligations of the authority and of such subsidiary corporations, together with the maintenance of proper reserves therefor, (b) the cost and expense of keeping the properties and assets of the authority and its subsidiary corporations in good condition and repair, and (c) the capital and operating expenses of the

authority and its subsidiary corporations. The authority may contract with the holders of bonds and notes with respect to the exercise of the powers authorized by this section. No acts or activities taken or proposed to be taken by the authority or any subsidiary of the authority pursuant to the provisions of this subdivision shall be deemed to be "actions" for the purposes or within the meaning of article eight of the environmental conservation law.

.....

5. The authority may acquire, hold, own, lease, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any of its facilities through, and cause any one or more of its powers, duties, functions or activities to be exercised or performed by, one or more wholly owned subsidiary corporations of the authority and

may transfer to or from any such corporation any moneys, real property or other property for any of the purposes of this title. The directors or members of each such subsidiary corporation shall be the same persons holding the offices of members of the authority. Each such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the authority and of the authority's property, functions and activities. Each such subsidiary corporation shall be subject to the restrictions and limitations to which the authority may be subject. Each such subsidiary corporation shall be subject to suit in accordance with section twelve hundred seventy-six of this title. The employees of any such subsidiary corporation, except those who are also employees of the authority,

shall not be deemed employees of the authority.

. . . .

Historical note

. . . .

<u>Subd. 5</u>. Amended L.1966, c. 415, § 5, eff. May 23, 1966, retroactive to Jan. 20, 1966.

L.1966, c. 415, § 5, among other changes, granted powers to subsidiary corporations and empowered the authority to create a public benefit corporation of one or more of its subsidiary corporations.

§ 1269. Notes and bonds of the authority

. . . .

8. The state shall not be liable on notes or bonds of the authority and such

notes and bonds shall not be a debt of the state, and such notes and bonds shall contain on the face thereof a statement to such effect.

APPENDIX F: Letters from New York State Comptroller to petitioner's counsel

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
ALBANY, NEW YORK
12236

EDWARD V. REGAN
STATE COMPTROLLER

MARVIN G. NAILOR
PRESS SECRETARY

June 5, 1984

Mr. Edgar Pauk
Legal Services for the Elderly
132 West 43rd St., 3rd floor
New York, New York 10036

Dear Mr. Pauk:

In response to your Freedom of Information request of May 29, 1984 the Office of the State Comptroller does not store any documents relating to private pension plans.

It is our understanding that every private pension plan must file a summary description with the U. S. Department of Labor in Washington, D.C. If you would contact that office, you might be able to obtain specific information on the Long Island Rail Road.

Sincerely,

/s/ Karen R. Collen
Karen R. Collen
Asst. Records Access Officer

PO:mc

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
ALBANY, NEW YORK
12236

EDWARD V. REGAN
STATE COMPTROLLER

MARVIN G. NAILOR
PRESS SECRETARY

June 13, 1984

Mr. Edgar Pauk
Legal Services for the Elderly
132 West 43rd St., 3rd floor
New York, New York 10036

Dear Mr. Pauk:

In follow-up of your May 29, 1984, Freedom of Information request and subsequent call to this office, I am informed by the Division of Retirement that the Comptroller has not issued an opinion to the Long Island Rail Road (LIRR) on the subject of the funding of its pension plan.

Also, as we discussed, the LIRR is not a participating employer in the Employees Retirement System. We suggest again that you contact the U.S. Department of Labor in Washington, D. C. should you wish to obtain information about the LIRR pension plan.

Sincerely,

/s/ Karen R. Collen
Karen R. Collen
Asst. Records Access Officer

KRC:mc